SHELL MALAYSIA TRADING SDN BHD

v.

FILOTEK TRADING SDN BHD

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CIVIL SUIT NO: 22-502-98]
19 APRIL 1999

CIVIL PROCEDURE: *Summary judgment - Defence of mere denial - Whether sufficient to resist application - Whether defendant's affidavit must condescend upon particulars - Whether affidavit ought to clearly state defence claimed and facts supporting the same*

CIVIL PROCEDURE: *Summary judgment - Application made using wrong form - Subordinate Courts' form used instead of High Court's corresponding form - Whether defendant misled - Whether defendant prejudiced - Whether summary judgment should not be granted*

CIVIL PROCEDURE: *Summary judgment - Affidavit - Affidavit supporting application did not include deponent's residential address - Whether minor technical defect - Whether summary judgment should not be granted*

CIVIL PROCEDURE: *Summary judgment - Certificates of Commissioner for Oaths not stamped on exhibits supporting application - Whether minor technical defect - Whether summary judgment should not be granted*

This was the defendant's appeal against the senior assistant registrar's decision to grant summary judgment to the plaintiff in respect of a sum of money allegedly owed to the plaintiff by the defendant for products sold and delivered. Before the senior assistant registrar, the defendant raised, *inter alia*, the following preliminary objections: (i) that the application was in the format of Form 65 of the Subordinate Court Rules and not in form 62 of the Rules of the High Court 1980 ('the RHC') as required by O. 32 r. 1 of the RHC; (ii) that the deponent of the affidavit supporting the application for summary judgment did not state his residential address as required by O. 41 r. 10 of the RHC; and (iii) that the certificates of the Commissioner for Oaths were not stamped on the exhibits filed in support of the application for summary judgment.

Apart from the preliminary objections raised, the defendant resisted the application for summary judgment by basically denying that it had any dealings with the plaintiff and that it had neither ordered nor received any goods. The plaintiff, on the other hand, exhibited delivery notes with the defendant's rubber stamp and signature.

Held:

[1] The deviation from the prescribed form 62 of the RHC had no substantial effect on the substantive application as it remained, in spite of the said deviation, an application for summary judgment. The defendant could not have been misled as to the order sought by the deviation from the prescribed form. Therefore, the defendant could not have been prejudiced by the use of the Subordinate Courts' form of application rather than the High Court's corresponding form of application.

[2] The failure by the deponent of the affidavit supporting the application for summary judgment to state his residential address and the omission to stamp the certificates of the Commissioner for Oaths on the exhibits are minor technical defects that should be treated as irregularities that shall not nullify the proceedings. It is not imperative to reject affidavits which do not include the deponent's residential address.

[3] A defendant may show cause against a plaintiff's application for summary judgment by the following methods: (i) by a preliminary or technical objection; (ii) on the merits, for example, that he has a good defence to the claim on the merits or that a difficult point of law is involved or there is a dispute as to the facts which ought to be tried or there is a real dispute as to the amount due which requires the taking of an account to determine the amount due or any other circumstances showing reasonable grounds of a bona fide defence.

[4] A defendant's affidavit in resisting an application for summary judgment must condescend upon particulars and should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it.

[5] The defence in the instant case is just a litany of the most unconvincing denials which had been refuted by the production of the delivery notes. The defendant did not condescend upon particulars and the defendant's bare contentions alone could not satisfy the court that there were reasonable grounds for saying so.

[Appeal dismissed.]

Case(s) referred to:

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1 ***(refd)***
Hyde v. Hyde [1888] 59 LT 523 ***(refd)***
John Wallingford v. Mutual Society [1880] 5 App Cas 685 ***(refd)***
Sing Hong (Kodiang) Sdn Bhd v. Pembinaan Ng Sheng Kwee Sdn Bhd & 6 Ors [1988] 1 CLJ 357 ***(refd)***
Re Levy [1889] 37 WR 396 ***(refd)***

Legislation referred to:
Interpretation Acts 1948 & 1967, s. 62
Rules of the High Court 1980, O. 2 r. 1(1), O. 32 r. 1, O. 41 rr. 1(4), 10

Other source(s) referred to:
The English Supreme Court Practice 1997 vol 1 para 14/3-4/3

For the plaintiff - Jeyasingam Balasingam; M/s Ghazi & Lim
For the defendant - Anoop Singh; M/s Anoop & See

Reported by Anushana Balasubramaniam

JUDGMENT

Jeffrey Tan J:

This is the defendant's appeal (encl. 13) to judge-in-chambers against the decision of the learned senior assistant registrar dated 18 November 1998, giving summary judgment to the plaintiff against the defendant, in the sum of RM258,076.65 together with interest at the rate of 8% per annum from 18 November 1998 till date of satisfaction. Incidentally, the plaintiff's claim against the defendant is for the sum of RM258,076.65, it being, the balance sum due and owing, allegedly, by the defendant to the plaintiff in respect of petroleum products (products) supplied by the plaintiff to the defendant.

"On the ground that a defendant has no defence to a claim included in a writ or to a particular part of a writ", a plaintiff may apply to court for summary judgment against that defendant (O. 14 r. 1). On the hearing of such an application, the court may give such judgment for the plaintiff against that defendant, "unless the court dismisses the application or the defendant satisfies the court with respect to the claim or to the part of the claim to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part" (O. 14 r. 3). A defendant may show cause against a plaintiff's application (i) by a preliminary or technical objection, or, (ii) on the merits, *eg*, that he has a good defence to the claim on the merits or that a difficult point of law is involved, or a dispute as to the facts which ought to be tried, or a real dispute as to the amount due which requires the taking of an account to determine, or any other circumstances showing reasonable grounds of a *bona fide* defence (*The English Supreme Court Practice 1997* vol. 1 para. 14/3 - 4/3)

What is a defence on the merits? The Supreme Court, in *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 MLJ 40, per Lee Hun Hoe CJ (Borneo), imparted that "a defence on the merits means merely raising only an arguable or triable issue".

Lim Beng Choon J., in *Sing Hong (Kodiang) Sdn Bhd v. Pembinaan Ng Sheng Kwee Sdn Bhd & 6 Ors* [1988] 1 CLJ 357; [1988] 1 MLJ 357 at 358, thus expounded a defence on the merits:

> No doubt Order 13 Rule 8 of the Rules of the High Court 1980 gives an unfettered discretion to the court to set aside a judgment entered in default of appearance. However, the Court's discretion under that rule must be exercised in accordance with the settled principle that if the judgment is a regular ... then it is an inflexible rule that there must be an affidavit of merits stating facts which can satisfy the Court that the Defendant has a reasonable defence on the merits (see *Bank Bumiputra Bhd v. Majlis Amanah Rakyat* [1979] 1 MLJ 23 @ 240, and 'defence on merits' as explained by Sir John Megaw in *Tong Lee Hua v. Yong Koh Chin* [1981] 2 MLJ 1 @ 2 mean a defence in which there appears 'to be an arguable issue' or as Lord Denning MR put it in *Burns v. Kondel* [1971] 1 Lloyd's Law Reports 554 @ 555, explains the phrase to mean 'a defence which discloses an arguable and triable issue.

Lord Blackburn, in *John Wallingford v. Mutual Society* [1880] 5 App Cas 685 at 704, thus stressed the importance of an affidavit stating facts which can satisfy the court that there is reasonable ground for the stated defence:

> I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, 'I owe the man nothing'. Doubtless, if it was true, that you owed the man nothing, as you swear, that would be a good defence. But that is not enough. You must satisfy the judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the judge that those are facts which make it reasonable that you should be allowed to raise the defence.

Likewise, in O. 14 proceedings, a defendant's affidavit must "condescend upon particulars" and "should, as far as possible, deal specifically with the plaintiff's claim and affidavit, and state clearly and concisely what the defence is, and what facts are relied on to support it". *The English Supreme Court Practice 1997* vol. 1 para. 14/3 - 4/4 relates furthermore:

> A mere general denial that the defendant is [not] indebted will not suffice (*Wallingford v. Mutual Society* [1880] 5 App. Cas. 685, per Lord Blackburn, p 701; *Re General Rail Syndicate, Whiteley's case* [1900] 1 Ch. 365, per Lord Lindley M.R., p 369; *Anon* [1875] W.N. 249, per Quain J., p 250) unless the grounds on which the defendant relies on as showing that he is not indebted are stated (ibid). If the affidavit commences with a statement that the defendant is not indebted to the plaintiff in the account claimed, or any part thereof, it should state why the defendant is not so indebted, and state the real nature of the defence relied on (Re General Rail Syndicate, above)

> ... if a legal objection is raised, the facts and the point of law arising thereon must be clearly stated (see O 18 r 11)
>
> .... in all cases, sufficient facts and particulars must be given to show that there is a triable issue (see r 3(1).

But is there an issue or question in dispute which ought to be tried or there ought for some other reason to be a trial?

Mr Anoop Singh for the defendant submitted that he had raised the following preliminary objections before the learned SAR, namely, (i) that encl. 7 was in the format of form 65 of the Subordinate Courts Rules 1980 and not form 62 of the Rules of the High Court 1980 as required by O. 32 r. 1 of the RHC, and that the grounds of the application were not stated, (ii) that the deponent of the affidavits supporting encl. 7 had not stated his residential address as required by O. 41 r. 1(4) of the RHC, (iii) that the fee of the Commissioner for Oaths was not stamped on the affidavits as required by O. 41 r. 10 of the RHC, and, (iv) that the certificates of the Commissioner for Oaths were not stamped on the exhibits. And Mr Anoop raised a further preliminary objection in this appeal, namely, that the jurat is silent as to the place of execution of the affidavits. Mr Jeyasingam for the plaintiff submitted that those irregularities had not prejudiced the defendant, and are curable under O. 2 r. 1 of the RHC and are not fatal.

With regard to those preliminary objections, with respect, it is absolutely untrue that the grounds of the application were not stated in encl. 7 or that the jurat is silent as to the place of execution of the affidavits supporting encl. 7. Enclosure 7 clearly stated - "alasan-alasan bagi permohonan ini adalah seperti pada affidavit Mohd Rasheed Khan yang difailkan bersama-sama ini" - that the grounds are as stated in the affidavit filed together with encl. 7, whilst the "jurats" clearly stated that Mohd Rasheed Khan had sworn his affidavits (encl. 6 & 9) at 16, Jalan Cempaka 27, Taman Cempaka, 68000 Ampang, Selangor and Kuala Lumpur. And it is absolutely untrue that O. 41 r. 10 requires the Commissioner for Oaths' fee to be stamped on the affidavits; it is the filing fee that is required to be stamped on the original affidavit.

But it is unquestionably true that the plaintiff's application for summary judgment was not made by summons in form 62 of the RHC 1980 but by form 65 of the SCR 1980, that the deponent of the affidavits in support of encl. 7 had not given his residential address, and that the certificates of the Commissioner for Oaths were not stamped on the exhibits. Yet, the court should not nullify the proceedings, for the following reasons.

First, the deviation from the prescribed form 62 of the RHC 1980 had no substantial effect on the substantive application, which remained, in spite of the deviation from the prescribed form, an application for summary judgment. The defendant could not have been misled as to the order sought by encl. 7 by the deviation from the prescribed form. And the defendant could not have been prejudiced by the use of the Subordinate Courts' form of application rather than the High Court's corresponding form of application.

Secondly, O. 32 r. 1 - the written law prescribing the form - "shall be deemed to provide that an instrument or other document purporting to be in that form shall not be invalidated by reason of any deviation from the form if the deviation has no substantial effect and is not calculated to mislead" (s. 62 of the Interpretation Acts 1948 and 1967).

And thirdly, the failure by the deponent of the affidavits supporting encl. 7 to state his residential address (but the deponent stated his business address), and the omission to stamp the certificates of the Commissioner for Oaths on the exhibits are minor technical defects that should "be treated as irregularities that shall not nullify the proceedings, any steps taken in the proceedings, or any document, judgment or order therein" (see O. 2 r. 1(1) of the RHC). Moreover, affidavits giving no residential address are not imperatively to be rejected (*Hyde v. Hyde* [1888] 59 LT 523; *Re Levy* [1889] 37 WR 396)

On the substantive defence, Mr Anoop contended that there were only seven deliveries of products between 7 August 1997 to 26 August 1997 (the period of supply of products stated in para. 5 of encl. 6), that the deponent had no personal knowledge of the deliveries but had not stated which sworn statements were based on personal knowledge and which were based on information, and that the purchase orders were not produced. Mr Jeyasingam contended that all deliveries correspond to the statement of accounts (encl. 6, exh. MRK-1), that there are no triable issues, and that interest on the judgment sum should commence from 1 December 1997 (the last date of supply of goods) instead of 18 November 1998. Mr Anoop replied that Filotek Sdn Bhd and not Filotek Trading Sdn Bhd signed three delivery orders, and that the plaintiff should follow the statutory forms.

The defendant contended, in the affidavit (encl. 6) of Yeoh Lai Hwa affirmed on 12 September 1998, (i) that the plaintiff had not proved the supply of products, (ii) that the plaintiff had not shown that the defendant ordered the products, (iii) that the defendant had not ordered and had not agreed to purchase or receive the products of the plaintiff, (iv) that the defendant had not agreed to the terms stated in the invoices, (v) that the defendant had not received the invoices or statements of accounts of the plaintiff, (vi) that the defendant had no dealings with the plaintiff, (vii) that the defendant does not

owe the plaintiff the sum of RM258,076.65 or any other sum, (viii) that the defendant had not received the products of the plaintiff, (ix) that it was the mandatory procedure of the defendant to issue purchase orders signed by two authorised persons, and to acknowledge the receipt of goods by affixing its rubber stamp and by signing the delivery note, (x) that the plaintiff's accounts are inaccurate, (xi) that the defendant had not received the plaintiff's notice of demand, (xii) that the plaintiff's notice of demand was inaccurate, defective and wrong in law, (xiii) that the defendant was not obliged to settle the notice of demand, (xiv) that the plaintiff had not satisfactorily explained the delay in the application for summary judgment, (xv) that the defendant had been advised that the plaintiff's application and affidavit in support had not disclosed a case, (xvi) that the application for summary judgment is defective, (xvii) that there is inexcusable delay in the application for summary judgment, (xviii) that there is a defence on merits, and, (xix) that there are triable issues that ought to be tried.

Rebutting that, the plaintiff produced, in encl. 9, a bundle of delivery notes with the defendant's rubber stamp and signature.

Nonetheless, the defendant still contended, in the affidavit (encl. 11) of Yeoh Lai Hwa affirmed on 5 October 1998, (i) that the defendant had not ordered any products, (ii) that there were no orders according to the defendant's mandatory procedure, that the defendant had not received the benefits of the products as alleged, (iii) that the defendant had not received the invoices exhibited, (iv) that the products were delivered, if at all delivered, to the wrong party and not to the defendant, (v) that the defendant is not acquainted with the signatures on the invoices exhibited, (vi) that the signatures on the invoices exhibited were not authorised signatures, (vii) that there is no evidence of the total value of the products sold and or delivered, (viii) that the rubber stamp on the delivery notes was not the rubber stamp used by the defendant, (ix) that the invoices exhibited evince that products were delivered elsewhere rather than to the defendant's office, (x) that the defendant had no requirement for the large quantity of products said to have been delivered, (xi) that the defendant had no record of the defendant's receipt of the plaintiff's products and or of the defendant's indebtedness to the plaintiff, and, (xii) that the defendant had a defence on the merits.

But with respect, the defence is just a litany of the most unconvincing denials: (i) The defendant contended that the plaintiff had not proved the supply of products, that the plaintiff had not shown that the defendant ordered the products, that the defendant had not ordered nor agreed to purchase or receive the products of the plaintiff, that the defendant had no dealings with the plaintiff, and, that the defendant had not received the products of the plaintiff.

Those contentions/denials were debunked altogether by exhibit "MRK - 3" (the plaintiff's invoices/delivery notes), for in each of those invoices/delivery notes are the defendant's acknowledgement (the rubber stamp and signature of the defendant) of the receipt of the plaintiff's products, the defendant's order (the reference of the defendant) for the products supplied, and the destination of the products supplied; (ii) The defendant contended that it was the mandatory procedure of the defendant to issue purchase orders signed by two authorised persons and that it was the mandatory procedure of the defendant to acknowledge the receipt of all goods by affixing its rubber stamp and by signing the delivery note. The plaintiff produced invoices/delivery notes with the defendant's rubber stamp and signature; and, (iii) The defendant contended that the defendant had not received the products and that the products were delivered, if delivered, to the wrong party and not the defendant. But Mr Anoop conceded in his submission, contradicting his client, that there were seven deliveries between 7 August 1997 to 26 August 1997.

Then clearly, it could not be true, as alleged by the defendant, that the defendant had no dealings whatsoever with the plaintiff, and or that the defendant had not ordered or agreed to purchase the products.

The defendant contended that the plaintiff's accounts were inaccurate, and that the notice of demand was inaccurate, defective, and wrong in law. Unfortunately, the defendant would not condescend upon particulars, and the defendant's bare contentions alone could not satisfy the court that there were reasonable grounds for saying so. The defendant contended that the defendant had not received the notice of demand. But then, it is always all so easy to deny what is only within one's personal knowledge. But it is not so easy to wish away the letter of demand (encl. 6, exh. MRK - 2) and AR card with the stamp albeit of one Filotek Engineering Sdn Bhd.

There are also no merits in the contentions that the plaintiff had not explained the delay in the application for summary judgment, and that deponent had not stated which statements were based on personal knowledge. The memorandum of appearance was filed on 8 August 1998, and the plaintiff could not at all be said to have delayed, since encl. 7 was filed on 5 September 1998, the application for summary judgment. And Mohd Rasheed Khan clearly stated that his sworn statements were based on the records of the plaintiff.

The court is satisfied that there is no triable issue and that there is no defence on merits to the plaintiff's claim or part of the claim. There is no issue or question in dispute, which ought to be tried. There is no other reason for a trial of the claim. Accordingly, encl. 13 is dismissed with costs.